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Brexit & financial services

The Market Abuse Regulation

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Introduction

The EU law rules on market abuse have been largely retained and converted into UK law following the end of the transition period. Nevertheless, although the applicable rules are currently still largely the same, issuers and market participants now need to comply in certain situations with two rather than one regulatory regime which already at this stage may result in additional reporting, notification and disclosure obligations. Moreover, the introduction of the Financial Services Bill which is currently making its way through Parliament may well indicate the start of divergences between the two sets of rules appearing, which may considerably increase an issuer's regulatory and compliance burden.

This note focuses on the changes that apply to the market abuse regulatory framework following the end of the Brexit transition period. To appreciate these changes, the EU law regime that previously applied will be reviewed first, before the new post-Brexit regime will be analysed, along with the potential impact that the new Financial Services Bill may have.

The applicable EU law regime

The Market Abuse Regulation (596/2014) ("MAR") came into force on 2 July 2014, repealing and replacing the Market Abuse Directive (2003/6/EC). It imposed a uniform set of rules to further strengthen the regulatory framework introduced by the Market Abuse Directive (2003/6/EC), with the overall aim to improve investor protection and preserve market integrity. Recital 7 of MAR defines "*market abuse*" as "*unlawful behaviour in the financial markets*" consisting of "*insider dealing, unlawful disclosure of inside information and market manipulation.*" Such actions are reprehensible as they prevent "*full and proper market transparency.*"

MAR was complemented by the Criminal Sanctions for Market Abuse Directive (2014/57/EU) ("CSMAD"), although the UK and Denmark opted out of this instrument. The UK government considered that it was not necessary to adopt CSMAD as similar protections were already in place in the UK under the Criminal Justice Act 1993 and the Financial Services Act 2012.

Scope

MAR's scope is vast as it applies to financial instruments that (i) are admitted to trading on a regulated market or for which a request for admission to trading has been made, (ii) are traded or admitted to trading or for which a request for admission to trading on an MTF has been made, (iii) are traded on an OTF, and (iv) do not fall within any of the three previous categories if the price or value of such a financial instrument depends on or has an effect on the price or value of a financial instrument referred to in those categories, which includes credit default swaps and contracts for difference.[1] It is important to note that MAR's scope includes any transaction, order or behaviour concerning any financial instrument whether or not it takes place on a trading venue.[2] MAR also has extra-territorial effect in that it applies to individuals and firms operating outside of the EU. As such, it captures traders situated outside the EU who seek to manipulate securities trading on an EU exchange.[3]

Notification requirements

Under MAR, market operators and investment firms must notify the competent authority of the relevant trading venue of any financial instrument which they start or cease to trade on that venue.[4] Such notifications must contain the names and identifiers of the financial instruments in question, as well as the date and time of the request for admission to trading, the admission to trading and of the first trade. The competent authorities of the trading venues must without delay transmit that information to ESMA, which publishes the notifications on its website.[5]

Insider dealing

Article 7 of MAR defines inside information as:

(1) information of a precise nature which has not been made public and which relates, either directly or indirectly, to an issuer, a financial instrument, a commodity derivative, or an emission allowance, and which, were it made public, would be likely to have a significant effect on the price of such financial instrument, derivative or commodity contract, emission allowance, or a related derivative financial instrument; and

(2) for persons charged with the execution of orders concerning financial instruments, information conveyed by a client and relating to the client's pending orders in financial instruments, which is of a precise nature, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, the price of related spot commodity contracts, or on the price of related derivative financial instruments.

The unlawful disclosure of inside information occurs whenever a person who possesses inside information discloses it to any other person, except if such disclosure is made in the normal exercise of an employment, a profession or duties.[6]

Insider dealing arises whenever a person who possesses inside information uses such information to acquire, dispose or amend an order in relation to the financial instrument to which it relates, whether he does so for his own account or for that of a third party.[7] The underlying purpose of the prohibition against insider dealing is to prevent people from gaining an unfair advantage from inside information to the detriment of market participants who are unaware thereof, which would ultimately undermine the integrity of the financial markets and investor confidence.[8] As a result, MAR makes it an offence to engage or attempt to engage in insider dealing, to recommend or induce another person to engage in insider dealing and to unlawfully disclose inside information.[9]

MAR also makes it an offence to engage or attempt to engage in market manipulation,[10] which occurs, amongst others, when a person enters into a transaction, places an order to trade or engages in any other behaviour which:

(1) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances;

(2) secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level; or

(3) affects or is likely to affect the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances, which employs a fictitious device or any other form of deception or contrivance.[11]

1. Article 2(1) MAR.
2. Article 2(3) MAR.
3. Article 2(4) MAR.
4. Article 4 MAR.
5. Article 4(2) MAR.
6. Article 10 MAR.
7. Article 8 MAR.
8. Recital 23 of MAR.
9. Article 14 MAR.
10. Article 15 MAR.
11. Article 12(1) MAR.

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Further activities that may constitute market manipulation include:

(1) the dissemination of information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances or secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading; or

(2) the transmission of false or misleading information or the provision of false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark.[12]

Annex I to MAR sets out non-exhaustive lists of indicators in relation to (i) the use of a fictitious device or form of deception or contrivance, and (ii) false or misleading signals and price securing.[13]

MAR imposes a duty on persons professionally arranging or executing transactions to notify their respective competent authority without delay in case they have a reasonable suspicion that an order or transaction in any financial instrument could constitute insider dealing, market manipulation or an attempt thereof.[14] Once the competent authority has received such a notification, it must transmit it immediately to the competent authorities of the trading venues that are concerned.[15]

Disclosure requirements

Public disclosure of inside information

Issuers are required to inform the public as soon as possible of inside information which directly concerns that issuer in a manner that allows fast access and a complete, correct and timely assessment of the information by the public.[16] Where an issuer, emission allowance market participant or person acting on their behalf discloses any inside information to a third party in the normal course of the exercise of an employment, profession or duties, that person must make a complete and effective public disclosure of that information. In case the disclosure to the third party was intentional, the public disclosure must be made simultaneously; if it was non-intentional, it must be made promptly.[17]

An issuer or emission allowance market participant may delay public disclosure of inside information provided that (i) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant, (ii) the delay is not likely to mislead the public, and (iii) the issuer or emission allowance market participant is able to ensure the confidentiality of the information. It is important to note that all three of these conditions must be met before public disclosure may be delayed[18] and may only be delayed as long as they are satisfied. Hence, if the inside information has been delayed but the confidentiality of such information can no longer be ensured, the information must be disclosed to the public as soon as possible.[19] Immediately after the information has been disclosed to the public, an issuer or emission allowance market participant must inform the competent authority that the information was delayed and provide a written explanation of how the three conditions were met.[20]

Insider lists

Issuers and persons acting on their behalf are also required to create lists of all the persons who have access to inside information and who are working for them under an employment contract or are otherwise performing tasks through which they have access to inside information. Such lists must be kept updated and be provided to the competent authority as soon as possible when requested.[21] Issuers and the persons acting on their behalf must also ensure that any person that is on the list acknowledges in writing the legal and regulatory duties that s/he is subject to and is aware of the sanctions for insider dealing and unlawful disclosure of inside information.[22]

Those insider lists must include at least (i) the identity of the persons having access to inside information, (ii) the reason for including them on the list, (iii) the date and time at which each such person obtained access to inside information, as well as (iv) the date on which the insider list was drawn up.[23]

Manager's transactions

A "*person discharging managerial responsibilities*" ("PDMR") is a person within an issuer, emission allowance market participant, an auction platform, auctioneer, or auction monitor, who is either a member of the administrative, management or supervisory body of that entity, or a senior executive who has regular access to inside information relating directly or indirectly to that entity and the power to take managerial decisions affecting the future developments and business prospects of that entity.[24]

Persons closely associated with PDMRs include their (i) spouse, partner, (ii) children and (iii) relatives who shared the same household for at least one year on the date of the relevant transaction, as well as (iv) any entity the managerial responsibilities of which are discharged by a PDMR or a person closely associated with him, which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person.[25]

PDMRs as well as persons closely associated with them must notify the issuer and the competent authority of every transaction conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto.[26] Regarding emission allowance market participants, PDMRs and persons closely associated with them must notify the emission allowance market participant and the competent authority of every transaction conducted on their own accounts relating to emission allowances, to auction products based thereon or to derivatives relating thereto.[27] It should be noted that there is a minimum threshold of EUR5,000 per calendar year which must be exceeded before the notification requirements bite,[28] which may be increased to EUR20,000 by a competent authority.[29]

Such notification shall include the name of the PDMR, the reason for the notification, the name of the relevant issuer or emission allowance market participant, a description and the identifier of the financial instrument, the nature of the transaction, as well as the date, place, price and volume of the transaction.[30]

12. Article 12(1) MAR. Please note that Article 12 sets out additional behaviour that may amount to market manipulation.
13. Article 12(3) MAR.
14. Article 16(2) MAR.
15. Article 16(4) MAR.
16. Article 17(1) MAR.
17. Article 17(8) MAR.
18. Article 17(4) MAR.
19. Article 17(7) MAR.
20. Article 17(4) MAR.
21. Article 18(1) MAR.
22. Article 18(2) MAR.
23. Article 18(3) MAR.
24. Article 3(1)(25) MAR.
25. Article 3(1)(26) MAR.
26. Article 19(1)(a) MAR. Other transactions that must be notified are set out in Article 19(7) MAR.
27. Article 19(1)(b) MAR.
28. Article 19(8) MAR.
29. Article 19(9) MAR.
30. Article 19(6) MAR.

The law applicable after the transition period

Following the end of the transition period, the UK has become a third country and now falls outside the legal framework of the EU. Pursuant to the European Union (Withdrawal) Act 2018, all EU law that was in force at 11pm on 31 December 2020 ("IP Completion Day") has been retained and converted into UK law. This process is also known as "*onshoring*." In order to recognise the UK's new position as a third country and to ensure that the retained laws operate effectively, the UK government has put in place several statutory instruments (the "Brexit SIs"). The Brexit SI that is relevant for the purposes of this note is the Market Abuse (Amendment) (EU Exit) Regulations (SI 2019/310) (the "Market Abuse Brexit SI"), which was published together with an explanatory memorandum.

The Market Abuse Brexit SI does not make any policy changes beyond those necessary to reflect the UK's position outside the EU and the UK government decided to adopt the same laws and rules that were previously in place wherever possible.[31] The changes that have occurred as a result of Brexit in relation to the applicable market abuse regime are therefore limited.

Scope

Following the end of the transition period, UK firms are now bound by the retained law on market abuse ("UK MAR"), which applies to financial instruments admitted to trading or traded on both UK and EU trading venues, ensuring that UK markets and market participants remain subject to the same requirements and protections as they previously were under MAR.[32] The decision to also include financial instruments admitted to trading or traded on EU venues, rather than to restrict the regime to apply to UK venues only, was made because of the close relationship between the UK and EU markets and to allow the FCA to be able to investigate, prohibit, and pursue cases of market abuse that are related to financial instruments which affect the UK market. As such, the FCA could for example take action against abuse of a UK firm's debt instruments which are admitted to trading on an EU trading venue. This amendment aims to ensure that confidence in the integrity and reputation of UK markets is maintained.[33]

Issuers (including non-UK issuers) with financial instruments admitted on a UK regulated market, MTF or OTF are similarly subject to UK MAR. As a result, issuers (whether situated in the UK or elsewhere) with financial instruments admitted on both a UK and an EU venue now have to comply with both the UK and EU market abuse regimes.

Disclosure requirements

The Market Abuse Brexit SI retains the notification requirements and processes imposed under MAR, including their content and format. However, the relevant competent authority to which such notifications must be made under UK law is now the FCA and issuers with financial instruments admitted on a UK trading venue, whether they are based in the UK or the EU, must send the notifications to the FCA, which includes reporting the dealings of PDMRs, delays in disclosing inside information and, if requested, the provision of insider lists.[34] These obligations do not affect any requirement that issuers may owe separately under EU law and they may thus owe separate and additional disclosure obligations towards the relevant competent authorities in the EU.

Transfer of functions

The functions of the various EU institutions have also been transferred to the respective UK authorities. As such, the EU Commission's power under MAR to make delegated acts has been transferred to HM Treasury. The FCA has become the UK's regulator for market abuse purposes and ESMA's powers to enforce the market abuse regulation and to make regulatory or implementing technical standards (ITS) have all been transferred to the FCA.[35]

The UK's obligations to co-operate and share information with EU authorities have ceased following IP Completion Day[36] and the UK has now fallen back on the existing model in relation to third countries, which provides for co-operation and the sharing of information to be carried out on a discretionary basis.[37]

The impact of the Financial Services Bill

On 21 October 2020, a new Financial Services Bill was introduced to Parliament. For the purposes of market abuse, the Bill, as it currently stands, proposes to (i) clarify that issuers as well as any person acting on their behalf or on their account are all required to maintain an insider list, (ii) reduce the period of time within which issuers must publish any PDMR transaction from three to two working days of the date of the transaction,[38] and (iii) increase the maximum sentence for criminal market abuse from seven to ten years, amending section 61 of the Criminal Justice Act 1993 and section 92 of the Financial Services Act 2012.[39] The Bill has completed the committee stage in the House of Lords and is now moving to the report stage for further scrutiny.

Although the Bill is unlikely to result in a major upheaval of the market abuse rules that are currently in place, it does appear to foreshadow an increasingly diverging regulatory landscape which would lead to an increased administrative and compliance burden for issuers and other financial actors.

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31. Explanatory Memorandum, para. 7.5.
32. Regulation 9 of the Market Abuse Brexit SI.
33. Explanatory Memorandum, paras. 2.8, 7.9.
34. Article 17-19 MAR. The same regime applies also to notifications under Articles 4 and 16 of MAR.
35. Regulation 13 Market Abuse Brexit SI; Explanatory Memorandum, paras. 7.10-7.12.
36. Regulation 13 Market Abuse Brexit SI; Explanatory Memorandum, para. 7.14.
37. Explanatory Memorandum, para. 7.14.
38. Clause 29 of the Financial Services Bill.
39. Clause 30 of the Financial Services Bill.

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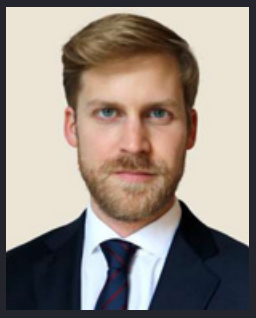

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